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Supreme Court, U.S.
FILED

No. 001357 FEB 27 2001

In The
Supreme Court for the United States

October Term, 2000

BRUCE BUCHBINDER, et ux.,

Petitioner,

v.

FRANCHISE TAX BOARD, et al.,
STATE OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit properly affirmed the United States District Court's order dismissing the action for lack of jurisdiction where:

(a). the Tax Injunction Act that barred petitioner's claims before the court did not apply to petitioner's persona, the United States District Court being without evidence of a judicial determination that petitioner was a taxpayer or that there was a tax liability in the instant matter; and,

(b). the United States Court of Appeals gravely erred by affirming the lower court's order dismissing the action, in that petitioner raised a Federal Question of due process right violations pursuant Article III, Amendment I and Amendment V of the Constitution for the United States of America, and invoked federal jurisdiction to protect its secured Constitutional Rights, in that petitioner was never provided a hearing in District Court, in that the outcome of petitioner's case in a federal related matter attached to the instant case in that the state follows federal judiciary outcome in matters of direct taxation of income; in that the State was a party in interest to the outcome of the controversy, in that the Tax Injunction Act and Eleventh Amendment supporting respondent's Motion to Dismiss did not apply to petitioner's persona, and in that respondent's argument regarding 42 U.S.C. § 1983 was without merit and groundless, the State having waived its sovereign immunity and the State and its agencies reduced to artificial persons, satisfying the definition of 'person' in 42 U.S.C. § 1983; these issues being substantial issues leading to an issue of violation of petitioner's Right to due process secured by the Constitution for the United States of America?

2. Was petitioner justified in invoking its due process Right

under the Constitution for the United States of America, and raising a Federal Question of due process right violations in response to state authorities violating that right, especially when those state authorities have quasi-judicial, legislative and executive powers, and especially in that the state authorities are a party in interest to the outcome of the controversy in the instant matter, and especially being that the Tax Injunction Act and Eleventh Amendment did not apply to petitioner's persona?

3. Is federal jurisdiction proper for a case where the petitioner has a secured Constitutional Right to due process, pursuant to Amendment V of the Constitution for the United States of America, such as in the instant case?

4. Is federal jurisdiction proper for a case where issues of law and fact in a related federal judiciary proceeding are controlling, in that the state follows federal judiciary outcome in matters of direct taxation of income, such as in the instant case; in that respondent defaulted by waiver in the related federal judiciary proceeding touching the instant case?

5. Does the waiver issue in a related federal case, attach to the instant case in that the state follows federal judiciary outcome in matters pertaining to direct taxation of income, giving the federal judiciary jurisdiction in the matter?

6. Is federal jurisdiction proper for a case raising the waiver issue, having its nexus in federal judiciary proceedings, properly denominating such a case for federal subject matter jurisdiction, such as in the instant case?

7. Is federal jurisdiction proper for a case where federal law is the basis of the action at the state level, and does this circumstance constitute a waiver of the Tax Injunction Act 28

U.S.C. § 1341 and vice versa relative to 26 U.S.C. § 7421; and where federal law is the basis of state direct taxation of income is it therefore an exception to 28 U.S.C. § 1341?

8. Does the federal judiciary have original jurisdiction pursuant Article III, Section 2, Clause 1, in such cases as the instant case, in that the state follows the federal judiciary outcome in matters of direct taxation of income, creating an exception to the Tax Injunction Act?

9. Is Statutory Law when used to defeat constitutional law in cases raising federal questions of due process right violations, such as in the instant case, unconstitutional and of no effect?

10. Can one Amendment of the Constitution of the United States of America deny to a citizen, a Right guaranteed under another Amendment, in a cause of action where the Eleventh Amendment used to support respondent's motion to dismiss would deny petitioner of a guaranteed due process Right under Amendment V, and especially where the Amendment denying the right did not apply to petitioner's persona in the first place (nor to respondent's persona)?

11. Does the State and its agencies satisfy the definition of 'person' in 42 U.S.C. § 1983, in that the State waived its sovereign immunity pursuant 28 U.S.C. § 1605 and the Clearfield Doctrine; in that the United States government is a foreign corporation with respect to the states and vice versa; in that the California Government Code Section 6300 ed sequencia defines the State a corporation, Bouvier's Sixth defining the term "Person" to include corporations as artificial persons; in that the State by such participation waived its sovereign immunity, thus the State and its agencies reduced to artificial persons like any other corporation (satisfying definition in 42 U.S.C. § 1983)?

12. Does the arbitrary dismissal of petitioner's cause of action before the United States District Court and the Ninth Circuit Court of Appeals constitute a denial of proper due process and right to meaningful access to the courts, in light of the circumstances as a whole in the instant case?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), petitioner lists the parties to the proceeding in the court below as follows:

Plaintiffs-Appellants

Bruce Buchbinder
Elaine Buchbinder

Defendants-Appellees

Franchise Tax Board, State of California
Board of Equalization, State of California

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PRELIMINARY STATEMENT

Petitioner Bruce Buchbinder and Elaine Buchbinder, who are not trained in the complexities of legal practices, hereby petition for a Writ of Certiorari, to the United States Court of Appeals for the Ninth Circuit, for the purpose that a supervisory opinion may issue from this Honorable Court, reviewing the actions of the United States District Court, and the United States Court of Appeals for the Ninth Circuit.

The relief sought results from the subsequent ruling of the District Court and the Ninth Circuit Court of Appeals, which have effectively and substantially denied petitioner's constitutionally protected and secured right to Redress of Grievance and Due Process.

Additionally this case involves an issue of a waiver filed in a previous Supreme Court case, *Buchbinder v. Internal Revenue Commissioner*, 127 L.Ed 2d 581, 114 S. Ct. 1238 (1994), to which the instant case is related in that the state follows federal judiciary outcome in such matters, wherein respondent in the previous case, knowingly and without coercion, waived its right to file in the face of petitioner's asserted facts and conclusions; respondent thereby defaulting by waiver, pursuant to Supreme Court Rule 15.5. This issue also involves a question of whether such waiver attaches to the instant case from the previous case above referenced.

The petitioner, in appearing pro se, relies on *Haines v. Kerner* (1972), 404 U.S. 519, *Price v. Johnson* (1948), 344 U.S. 266, plus many others, in that "pro se," "pro per" litigants are not held to the same standards as attorneys, appearing on 'appeal' in this Court.

OPINIONS BELOW

The Order of the Court of Appeals for the Ninth Circuit has not been reported. It is copied and attached to the appendix hereto, APP. A, *infra*.

The Memorandum of the Court of Appeals for the Ninth Circuit has not been reported. It is copied and attached to the appendix hereto, APP. B, *infra*.

The Judgment of the United States District Court has not been reported. It is copied and attached to the appendix hereto, APP. C, *infra*.

The Order Dismissing Complaint and Vacating Hearing Date of the United States District Court has not been reported. It is copied and attached to the appendix hereto, APP. D, *infra*.

JURISDICTION

The Franchise Tax Board's Notice of Action issued to the Buchbinders on March 11, 1997. Subsequently, the petitioner filed a timely petition to the Board of Equalization, State of California. The final decision of the Board of Equalization was entered on July 1, 1999. Thereafter, the Buchbinders filed a timely petition with the United States District Court in a cause of action involving the United States Constitution, Amendment V and raising a federal question of violation of due process rights. The respondent by motion and memorandum argued for dismissal of the Buchbinders' appeal claiming that the District Court lacked jurisdiction over respondent and the subject matter, citing to the Tax Injunction Act and Eleventh Amendment. The final order of the court dismissing the case was filed on December 7, 1999 and the Judgment entering dismissal was filed on December 8, 1999. The Buchbinders

then filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals on December 23, 1999. On April 7, 2000, petitioner filed an informal opening Brief. Subsequently, the respondent in its Brief of Appellee argued for dismissal of petitioner's appeal. On May 22, 2000, petitioner filed an informal Brief in Reply. The Memorandum of the Court affirming the District Court's order was filed on October 27, 2000. Subsequently, petitioner filed a Petition for Rehearing on November 8, 2000. The Order of the Court denying the Petition for Rehearing was filed on December 8, 2000 with no further filings permitted.

Jurisdiction in the instant case is established under the Preamble to the Constitution for the United States of America, wherein it specifies responsibilities of the government for whom the judges of this Land now labor under oath of office.

Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

Authority to proceed in this Court is by authority of the people of the united States by their Constitution, Article III, Section 2, Clauses 1 and 2 in which this Court has Appellate Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Preamble to the United States Constitution

The Preamble to the United States Constitution provides:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare and secure the

> Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Articles to the United States Constitution

Article III, Section 2, Clause 1 provides in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article IV, Section 2, Clause 1 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

Amendments to the United States Constitution

Amendment I of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting... the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V of the United States Constitution provides in pertinent part:

> No person shall.... be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case arose on March 11, 1997, when petitioner received a Notice of Action from the Franchise Tax Board (FTB). Petitioner filed a Notice of Appeal; Refusal of Assessment for Cause; Opening Argument on April 2, 1997 with the State Board of Equalization. On or about May 8, 1997 the State Board acknowledged an appeal had been filed.

Petitioner raised more than a single issue before the State Board, involving mixed questions of law and fact of Constitutional import, in particular the issue of the Franchise Tax Board not informing petitioner of the nature of the Excise Taxable Activity it was involved in that would create an "income tax liability" to provide a basis for a proper and valid assessment. Specifically, petitioner claimed the Franchise Tax Board did not inform petitioner WHAT Excise Taxable Activity it was involved in that would create an "income tax liability" to provide a basis for a proper and valid assessment.

A secondary issue brought before the State Board of Equalization was the issue of jurisdiction, wherein petitioner challenged the Franchise Tax Board and State Board's jurisdiction and alleged that personam jurisdiction relative to the matter had been invoked by fraud.

Subsequently, on July 31, 1997, the Franchise Tax Board filed an opening brief, wherein respondent in an attempt to avoid the issues raised by petitioner, incorrectly filed its reply brief as an opening brief. Respondent in that brief characterizing petitioner's arguments as frivolous and alleging that petitioner had not presented any evidence to show that the federal and state adjustments were incorrect.

Petitioner strongly contested respondent's claims in a Brief in Reply filed on August 28, 1997, contending that petitioner in its opening brief, asserted verifiable, meritorious arguments against any liability of petitioner, supported by decisions of the State Board, several Supreme Courts from around the land, the United States Tax Court, and several Federal Courts, including statutes, codes and regulations which related to the instant subject matter. Petitioner contending that respondent's allegation of frivolous arguments was nothing more than a bare naked allegation, not constituting a formal objection, and that respondent had not addressed the issues raised by petitioner in a substantive manner, other than to say that the petitioner's arguments appeared "frivolous". Petitioner asserted that to the contrary in its opening brief petitioner had raised issues of a jurisdictional nature that went to the taxing power of the Franchise Tax Board in the instant case, and to the State Board (jurisdiction being the threshold issue).

Thereafter, on February 25, 1999, the State Board of Equalization issued their arbitrary and capricious decision, which ignored petitioner's specifically worded issues and denied any review on any of those issues.

On March 23, 1999, petitioner filed a Petition for Rehearing to the State Board, in which petitioner took issue with the State Board's determination, pointing out to the Board material points of law and fact overlooked in their decision. Nevertheless, the State Board turning a deaf ear to petitioner, denied the Petition for Rehearing on July 1, 1999 and affirmed its previous order of February 25, 1999.

Subsequently, on September 23, 1999, petitioner filed a Petition for Judicial Determination and Declaratory Judgment on Issues of Law in United States District Court for the Northern District of California, raising a Federal Question of

Due Process right violations, invoking its Due Process rights under Amendment V, on the jurisdictional grounds that the U.S. District Court was the proper forum for its grievances, in that petitioner had exhausted all administrative appeals with the State Board of Equalization, citing authority to proceed in District Court by authority of the people of the united States by their Constitution, Article III, Section 2, Clause 1, in which the court had original jurisdiction; petitioner thereby exercising its secured Right to petition for Redress of Grievance pursuant to Article IV, Section 2, Clause 1, Amendment I, and IX of the Constitution for the United States of America. The petitioner taking the appeal from the final decision entered by the State Board of Equalization to U.S. District Court, raising a case and controversy arising under the Constitution for the United States, therefore the case was properly brought before the court under the provisions of Article III, Section 2 of the Constitution for the United States, and was entitled to be treated as such. As a result of the constitutional nature of the case, it was entitled to be reviewed by Judges completely endowed with the powers and immunities of Article III, Section 1 of the Constitution. This Constitutional guarantee of review was an impossibility before the State Board of Equalization, and completely denied the Buchbinders' full Due Process of the Law. None of the legal and factual issues raised by petitioner were given any substantial legal analysis by the State Board nor was a well-reasoned conclusion relative to these issues entered by the Board.

Petitioner claimed in its petition to the U.S. District Court that:

> 1. Petitioner's appeal to the State Board raised more than a single argument, involving mixed questions of law and fact, of Constitutional import, that were not properly addressed in the decision issued

by the State Board of Equalization, in particular the issue of the Franchise Tax Board not informing petitioner of the nature of the "Excise Taxable Activity" it was involved in to create a basis for a proper and valid assessment. Specifically, the Franchise Tax Board did not inform petitioner WHAT Excise Taxable Activity it was involved in that would create an "income tax liability" to provide a basis for a proper and valid assessment.

2. In its Decision, filed February 25, 1999, the State Board reduced petitioner's multiple arguments to a single issue, namely that petitioner's appeal and briefs did not answer why petitioner believed its partnership loss deduction should be sustained, thus regurgitating the issue of the assessment, while completely ignoring the important issue of WHAT constitutes a valid and proper assessment relative to the FTB's failure to identify the "Excise Taxable Activity" that would provide such basis, and thus keep State statutes in harmony with Federal statutes relative to taxation of income; this being the basis of petitioner's claim that said assessments were in error. This arbitrary and unfair treatment of petitioner gave the State Board the excuse to deprive petitioner of any legal analysis to the arguments raised by petitioner in its Briefs, and pre-empted the State Board from producing any evidence to the contrary. Therefore, the State Board, because it perceived the petitioner as having failed to present any evidence demonstrating that the FTB's assessments were erroneous, when in fact petitioner documented the fact that the state income tax was in the nature of a corporate income tax and thus not applicable to the petitioner, and therefore lacking in personam jurisdiction and grounded in

fraud; nevertheless the Board took it upon itself to unjustifiably characterize petitioner as failing to support its assertions with evidence, thus depriving petitioner of proper due process of law.

3. Petitioner alleged its arguments were neither unitary nor so simple as that characterized by the State Board's decision. To the contrary, petitioner argued, among other things, that the Franchise Tax Board had not identified the "Excise Taxable Activity" that would give proper and valid basis to the assessment, and that the state personal income tax was either a direct tax or indirect tax like the federal income tax, citing to *Pollock v. Farmers Loan and Trust*, 158 U.S. 601 and *Eisner v. Macomber* (1920), 252 U.S. 189; the enabling legislation of the Tax Codes being, *The Corporate Excise Tax Act of 1909* (36 Stat S ch. 11, 12); limited by restrictions placed by the Constitution, and in the nature of a corporate income tax. Petitioner further argued that the FTB had not identified that activity which petitioner was involved in that created the so-called "income tax liability", further arguing that such cannot be based on what was previously done in former years, as previous filings may have been actually in error due to fraud and extortion demands made upon petitioner by the Franchise Tax Board ab initio, relating to some pretended requirement of filing returns; and that a liability was not created by a demand to file a return, or that a return was filed previously, or that conditions of former years apply automatically in the present year or any subsequent year. The petitioner further arguing, that the California Courts and the State Board of Equalization itself, had declared that the "Franchise Tax" is based on the Profit made within the taxable

year because it was a corporation, citing to *American Water States Service Co. of California v. Johnson* (1939), 31 Ca 2d 606, 88 P2d 770; *West Publishing Co. v. McColgam* (1946), 27 C2d 705 aff'd 328 U.S. 823; *Rosemary Properties* (1947), 29 C2d 677, and in particular showing to the State Board that in the Appeal of *hor Electronics, Inc*, the State Board clearly stated on February 4, 1975, that "the franchise tax is not a tax on property or income; it is an excise tax on the privilege of exercising the corporate franchise which is measured by the corporation's net income"; petitioner further showing to the State Board, that it was declared that income meant corporate profits and that the tax was based upon the benefit of exercising the corporate privilege, measured by the corporate profit, citing to *Merchants Loan and Trust v. Smietanka* (1921), 255 US 509 wherein the High Court stated:

> "It is obvious that these decisions in principle rule the case at bar if the word 'income' has the same meaning in the Income Tax Act of 1913 that it had in the Corporation Excise Tax Act of 1909, and that it has the same scope of meaning was in effect decided in *Southern Pacific v. Lowe*, 247 US 330, 335 ... where it was assumed for the purposes of decision that there was no difference in its meaning as used in the Act of 1909 and in the Income Tax Act of 1913 (38 Stat 114). **There can be no doubt** that the word must be given the same meaning and content in the Income Tax Acts of 1916 and 1917 that it had in the Act of 1913. When to this we add that in *Eisner v. Macomber, Supra*, a case arising under the same Income Tax Act of

> 1916 which is here involved, the definition of 'income' which was applied was adopted from *Stratton's Independence v. Howbert, Supra*, arising under the Corporation Excise Tax Act of 1909, with the addition that it should include 'profit gained through the sale or conversion of capital assets,' **there would seem to be no room to doubt** that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act, and that what that meaning is has now become definitely settled by decisions of this Court." At 519 (Emphasis added).

And, further citing to the Tennessee Supreme Court in *Cole v. Macfarland,* wherein that High Court stated:

> "Legislature can name any privilege a taxable privilege and tax it by means other than an income tax, but the legislature cannot name something to be a taxable privilege unless it is first a privilege... 'Privileges are special rights, belonging to the individual or class, and not the mass; properly, an exemption from some general burden, obligation or duty; a right peculiar to some individual or body.' *Lonas v. State 50 Tenn.*, 287, 307. Since the right to receive income or earnings is a right belonging to every person, this right cannot be taxed as a privilege." 337 S.W. 2d 453,455,456.

4. Consequently, under authorities cited in petitioner's brief and based on its peculiar factual situation, petitioner contended therein that its proper legal status was that of non-taxpayer, and that the

assessment in question was false and therefore not valid. Given that status and circumstance, petitioner logically concluded that there were no grounds for the deficiency assessment made by the Franchise Tax Board.

5. None of the above issues advanced by petitioner were adequately addressed in the Decision issued by the State Board, thus resulting in the affirmation of the Appeal in favor of the Franchise Tax Board, and in violation of petitioner's Due Process Rights.

6. Having collapsed all of petitioner's substantive arguments, and its contention of case law as well, into the single proposition that petitioner's appeal and brief did not answer why petitioner believed its partnership loss deduction should be sustained, the State Board's Decision necessarily left unanswered and unaddressed essentially all of petitioner's material points of law and fact which it had actually raised in its brief.

In addition to the above claims made in its petition to the U.S. District Court, petitioner further claimed that it did not receive the Scope of Review that it was entitled to under State equivalent Statutes to the Administrative Procedures Act, Title 5, Section 706, and other State Statutes and Government Codes enacted to protect petitioner's Due Process Rights pursuant to Amendment V of the United States Constitution, to effect harmony between federal and state law regarding the matter of Due Process; whereas the United States Constitution is the Supreme Law of the Land (See U.S. Constitution, Article VI, Section 2) and recognized as the Supreme Law of the Land by the California Constitution, in Article III, Section 1.

On October 28, 1999, while petitioner's Petition to the

United States District Court was pending, respondent filed a Notice of Motion to Dismiss Complaint and a Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint. In the memorandum supporting its motion, respondent claimed the District Court lacked jurisdiction over respondent, and the subject matter, and cited to the Tax Injunction Act and the Eleventh Amendment, further citing to the Seminole Indian case.

Petitioner opposed respondent's Motion on the grounds that the Tax Injunction Act and Eleventh Amendment did not apply to petitioner's persona in the instant matter, among other things, and that the instant cause of action raised a federal issue in Due Process under the United States Constitution, and as such, pursuant to Amendment V, federal court jurisdiction was appropriate in the instant case; the California Constitution Article III, Section 1 stating the United States Constitution is the Supreme Law of the Land, therefore federal court jurisdiction was applicable to respondent.

The Order Dismissing Complaint and Vacating Hearing Date was filed on December 7, 1999 and the Judgment entering dismissal was filed on December 8, 1999. In the Order the judge dismissed petitioner's Complaint with prejudice and granted the respondent's motion on the grounds that petitioner's claims were barred by the Tax Injunction Act and Eleventh Amendment, and further directed the Clerk to remove the scheduled hearing on respondent's motion from the court calendar.

On December 23, 1999, petitioner timely filed a Notice of Appeal to the Ninth Circuit Court of Appeals through District Court (APP. E, *infra*). In docketing the case, the clerk of the lower court arbitrarily chose to drop one of the parties in interest (Board of Equalization, State of California); such action

being incorrect and irreparably flawing the proceeding. On April 7, 2000, petitioner filed an informal opening Brief, in which the petitioner raised the issue, among other things, of whether statutory law such as the Tax Injunction Act used to defeat constitutional law in cases raising Federal Questions of Due Process right violations, is unconstitutional, and further showing that the Tax Injunction Act and Eleventh Amendment did not apply to petitioner's persona in the first place in the instant matter, that the State was a party in interest to the outcome of the controversy, and that the instant cause of action raised a federal issue in Due Process under the U.S. Constitution, and as such, federal court jurisdiction was appropriate in the instant case; the California Constitution Article III, Section 1 stating the United States Constitution is the Supreme Law of the Land, therefore in view of the above federal court jurisdiction was applicable to respondent.

Subsequently, on May 9, 2000, the respondent in its Brief of Appellee, requested the court to dismiss petitioner's appeal, claiming that the District Court had lacked jurisdiction over the subject matter and respondent, citing to the Tax Injunction Act and Eleventh Amendment.

Petitioner filed an informal Brief in Reply on May 22, 2000 stating that in its Opening Brief it had argued among other things that the Tax Injunction Act and Eleventh Amendment did not apply to petitioner's persona, that the instant cause of action raised a federal question of Due Process, that the State was a party in interest, and further raising the issue of whether the outcome of petitioner's case in a federal related matter attached to the instant case, and whether issues of law and fact in that related federal judiciary proceeding were controlling in the instant case, the state following federal judiciary outcome in matters pertaining to direct taxation of income; particularly, the waiver issue, an issue of paramount importance; and that being

that the waiver issue was a complex and delicate question that had its nexus in the federal judiciary process in a federal related case to the instant case, no state court was proper venue for complex questions of law and fact raised by petitioner, such as the waiver issue.

However the Ninth Circuit ignored the issues raised by petitioner, and on October 27, 2000 filed its Memorandum affirming the District Court's order.

Subsequently, on November 8, 2000, petitioner filed a timely Petition for Rehearing, pursuant Rule 40 of the Federal Rules of Appellate Procedure, pointing out that in its opinion several material points of law and fact had been overlooked in the circuit court's decision, amongst other things that petitioner had never received a hearing in U.S. District Court, a hearing being absolutely essential to Due Process; that the Tax Injunction Act did not apply to petitioner's persona and lacked jurisdiction over petitioner because the lower court was without evidence of a judicial determination that a tax liability had ever been established in the instant matter; that the State was a party in interest to the outcome of the controversy; that the waiver issue in a federal related matter attached to the instant case, making it a proper case for federal court jurisdiction; that the Eleventh Amendment did not apply to the matter as petitioner was bringing suit against the State wherein petitioner was domiciled; and that in particular petitioner showing to the court that respondent's argument with respect to 42 U.S.C. § 1983 was groundless (respondent having contested petitioner's claims in the lower court that due process right violations are not protected by the Tax Injunction Act nor the Eleventh Amendment and fall within the domain of 42 U.S.C. § 1983, a mandate upon the federal courts to protect constitutional rights); that respondent's cites did not fit the fact pattern of the instant case nor petitioner's persona; that the State waived its sovereign

immunity pursuant 28 U.S.C. § 1605 and the Clearfield Doctrine (*Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573, 87 L.Ed. 838 (1943); that the United States government is a foreign corporation with respect to the states and vice versa; that the California Government Code Section 6300 ed sequencia defining the State a corporation, citing the legal definition of "Person" as listed in Bouvier's Sixth to include corporations as artificial persons; petitioner asserting that the State by such participation waived its sovereign immunity, thus the State and its agencies reduced to artificial persons like any other corporation (satisfying definition in 42 U.S.C. § 1983); fundamental precept of law being that when state government engages in business, the laws of business apply, as if the government were a mere private corporation; and that a private corporation having no sovereign rights, exists only as governmental privilege. Thus the State, in such capacity, losing sovereign immunity from Federal power. Respondent not objecting to the above assertions, deemed admitted pursuant Federal Rules of Civil Procedure 8 (d).

The Order of the Ninth Circuit filed on December 8, 2000, denying the Petition for Rehearing, with no further filings permitted, left unanswered and unaddressed essentially all material points of law and fact which petitioner raised in its briefs, in particular petitioner's assertions that the State and its agencies satisfied the definition of 'person' in 42 U.S.C. § 1983.

REASONS FOR GRANTING WRIT

Petitioner in coming before the federal court system, invoked jurisdiction of the lower courts pursuant to the United States Constitution, Article III, Section 2, Amendment I and Amendment V, petitioner having raised a Federal Question

involving petitioner's Right to due process secured by the Constitution for the United States of America.

The questions raised in this appeal by petitioner involve a matter of due process and a question as to whether statutory law used to defeat constitutional law in cases raising federal questions of due process right violations, is unconstitutional and of no effect, i.e. whether a statute or act such as the Tax Injunction Act can preclude petitioner from a constitutionally guaranteed right to due process secured by the United States Constitution, especially in light of the circumstances involved in the instant case. Further there is a question of whether the Tax Injunction Act that barred petitioner's claims before the lower court even applied to petitioner's persona because of jurisdictional issues raised by petitioner from the beginning (this being an issue of contention). As such this question is a question of paramount importance, and in that the lower courts did not do their duty and hear the question, it adversely impacted the due process right of petitioner in this matter.

Neither the Tax Injunction Act nor Eleventh Amendment applied to petitioner's persona as the lower court was without evidence of a judicial determination that petitioner was a taxpayer or that there was a tax liability in the instant matter; and as to the Eleventh Amendment and cite to the Seminole Indian case, it did not fit the fact pattern of the instant case as the Eleventh Amendment was not at issue and petitioner was not a Seminole Indian (nor was respondent). Furthermore there is a question as to whether the State and its agencies satisfy the definition of 'person' in 42 U.S.C. § 1983, respondent leaning heavily upon its argument that the State and its agencies were not persons within the meaning of 42 U.S.C. § 1983, petitioner showing to the lower court that the State and its agencies did in fact fit the legal definition of 'person' in 42 U.S.C. § 1983. As the Tax Injunction Act and Eleventh Amendment were the only

grounds for respondent's motion to dismiss, therefore respondent's motion was groundless and without merit and as such defective and the lower court (here the U.S. District Court) should never have granted it, nor should the Ninth Circuit have affirmed the lower court's order, especially in view of the fact that the State and its agencies satisfied the definition of 'person' in 42 U.S.C. § 1983.

In light of these errors, and the controversial waiver issue in petitioner's federal related case, and in that the State was a party in interest to the outcome of the controversy, the lower court's action and the Circuit Court's affirmation clearly constitutes a denial of petitioner's Right to proper due process secured by the Constitution for the United States of America and Right to meaningful access to the courts.

The Congress of the United States has granted jurisdiction to the lower federal courts over the issues raised in petitioner's petition with respect to both state and federal issues pursuant to 28 U.S.C., paragraphs 1331, 1332, and 1333 (savings to suitors clause). But more importantly, the Constitution for the United States of America, and the Constitution for the State of California demand that these courts enforce the laws of the United States as enacted by Congress to preserve Constitutional Rights, and Civil Rights, as well as to due process.

In an article touching on this subject, written by Albert J. Schweppe, in the American Bar Association Journal, Vol XXIV No. 6, June 1938, entitled "What Has Happened to Federal Jurisprudence", Mr. Schweppe made the following point:

> "At least, a Federal Court sitting in a particular state is just as much a court of final adjudication as is a state court, and such a Federal Court is quite as competent to determine the law of that particular state as is a

> State Court. This the Constitution clearly intended; and a Federal Court cannot escape this duty, whether the local law be clearly declared on the particular point or not, and even if it not be declared at all."

This petitioner had no remedy at law at the state level as was demonstrated by the inability of the State Board to adequately address the issues brought before it, such issues involving mixed questions of law and fact by which the historical facts had to be concluded before the applicable law could be applied; involving a subcategory of the mixed question doctrine, which is a "Constitutional fact" question involving applications of constitutional principles to the factual determinations; involving important questions concerning the scope and meaning of United States Supreme Court decisions, relative to the issue of taxation touching both federal and state taxing systems, thus three substantial questions, that all had to be reviewed together before just findings and conclusions could be arrived at in the instant matter.

Further, the questions raised in this appeal involve a question as to whether the outcome of petitioner's case in a federal related matter *(Buchbinder v. Internal Revenue Commissioner*, 127 L.Ed 2d 581, 114 S. Ct. 1238 (1994)) attaches to the instant case, and whether issues of law and fact in that related federal judiciary proceeding are controlling in the instant case. Significantly, such issues include the waiver issue, a question of paramount importance. In this regard, petitioner asked the lower court to take judicial notice of the fact that issues relating to the year in question, had been litigated in a federal related case in U.S. Tax Court, and that the decision of the Tax Court had been appealed to the U.S. Court of Appeals for the Ninth Circuit, and subsequently to the U.S. Supreme Court and that upon appeal to the Supreme Court, the respondent in that federal related case had defaulted pursuant to

waiver; petitioner claiming in a Supplemental Brief that the waiver in face of petitioner's asserted facts and conclusions served to leave petitioner's allegations uncontested before the Supreme Court, thereby leaving respondent unable to later act in contravention of those allegations (blocked by Estoppel) leaving no grounds for further action in the matter, petitioner claiming a default judgement against respondent in that related case; and in that respondent in that case did not object to petitioner's claims, petitioner's claims were deemed admitted pursuant Federal Rules of Civil Procedure 8 (d), all touching the instant case.

The instant case was a proper case for federal court jurisdiction not only because the state follows the federal judiciary in matters pertaining to state direct taxation of income, but also because the waiver issue was an issue raised by petitioner before the State Board of Equalization. The waiver issue is a complex and delicate question that had its nexus in the federal judiciary process in a federal related case to the instant case, and if this question was to be properly addressed it had to be addressed on the federal level due to the nature of the issue. Therefore, no state court was proper venue for complex questions of law and fact raised by petitioner, such as the waiver issue in the instant case.

On the other hand, the case was not a proper case for the state court system in that the State was a party in interest to the outcome of the controversy in the instant matter, and that notwithstanding anything to the contrary, the petitioner had exhausted all administrative remedies on the state level, and the State lost primary jurisdiction in the instant matter because of due process right violations, and therefore, it would have been futile to exhaust any further remedies on the state level.

Further, this case involves a question as to whether the State

and its agencies satisfy the definition of 'person' in 42 U.S.C. § 1983, in that the State waived its sovereign immunity pursuant 28 U.S.C. § 1605 and the Clearfield Doctrine; and in that the California Government Code Section 6300 ed sequencia defining the State a corporation, Bouvier's Sixth defining the term "Person" to include corporations as artificial persons; the State by such participation waiving its sovereign immunity, thus the State and its agencies reduced to artificial persons like any other corporation (satisfying definition in 42 U.S.C. § 1983); and respondent not objecting to the above assertions, deemed admitted pursuant Federal Rules of Civil Procedure 8 (d). Being that the lower court was heavily influenced by respondent's erroneous argument regarding 42 U.S.C. § 1983, in rendering its flawed decision, thus contributed to the encroachment on petitioner's rights, privileges, and immunities secured by the Constitution and laws.

The U.S. District Court below erred grievously in dismissing petitioner's cause of action. And the Ninth Circuit Court only served to compound the error. To remember the words of *Boyd v. United States,* (1886) 116 U.S. 616, 635 :

> It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be Obsta Principiis.

Invoking Obsta Principiis, this Court must exercise its supervisory powers to resolve a far reaching dilemma in judicial proceedings

There is a far-reaching dilemma that must be resolved in the instant case. An important issue that bears upon the supervisory role of this Honorable Court is the issue of the arbitrary dismissal of petitioner's cause of action before the United States District Court and Ninth Circuit Court of Appeals, and whether

their action constituted a denial of proper due process, and Right to meaningful access to the courts.

The question asks: does the arbitrary dismissal of petitioner's cause of action before the United States District Court and the Ninth Circuit Court of Appeals constitute a denial of proper due process and right to meaningful access to the courts taking into consideration the circumstances as a whole in the instant case, and especially in light of the fact that petitioner did not receive a hearing at the District Court level?

This Court should grant certiorari in order to resolve this important issue and other issues that the lower courts refuse to address, in order that petitioner receive a full and meaningful review and substansive due process as guaranteed to it as a secured Right of the Constitution for the United States of America.

CONCLUSION

Being that petitioner raised a Federal Question of due process right violations pursuant Article III, Amendment I and Amendment V of the Constitution for the United States of America, and invoked federal jurisdiction to protect its secured Constitutional Rights, thereby exercising its secured Rights; and especially in light of the controversial waiver issue in petitioner's federal related case; in that the state follows federal judiciary outcome in matters of direct taxation of income; in that the Tax Injunction Act and Eleventh Amendment did not apply to petitioner's persona; in that the State was a party in interest to the outcome of the controversy; in that petitioner was never provided a hearing in District Court; and in that respondent's argument regarding 42 U.S.C. § 1983 was without merit and groundless, the State and its agencies satisfying the

definition of 'person' in 42 U.S.C. § 1983; the action of the lower courts in the instant case clearly constitutes a denial of petitioner's Right to proper due process secured by the Constitution for the United States of America and Right to meaningful access to the Courts.

Since neither the Tax Injunction Act nor the Eleventh Amendment applied to petitioner's persona (nor to respondent), and being that respondent's argument regarding 42 U.S.C. § 1983 was meritless, these being the only grounds for respondent's motion to dismiss before the U.S. District Court, therefore respondent's motion was groundless and without merit and as such defective, and the lower court should never have granted it nor should the Ninth Circuit have affirmed it.

Therefore for the reasons stated herein and in the record, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE BUCHBINDER
ELAINE BUCHBINDER
1178 Via Ferrari Drive
San Jose, California 95122
(408) 279-4054
Petitioner in Pro Se

DATED: February 16, 2001

APPENDIX A -- NINTH CIRCUIT ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE BUCHBINDER; ELAINE BUCHBINDER, Plaintiffs-Appellants, v. FRANCHISE TAX BOARD, STATE OF CALIFORNIA, Defendant-Appellee.	No. 00-15068 CV-99-20973-RMW Northern District of California (San Jose) ORDER (Filed Dec 8, 2000)

Before: PREGERSON, KLEINFELD and GOULD, Circuit Judges.

Appellants' petition for panel rehearing is denied.

No further filings shall be accepted in this closed appeal.

APPENDIX B -- NINTH CIRCUIT MEMORANDUM AFFIRMING DISTRICT COURT'S ORDER DISMISSING ACTION

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE BUCHBINDER; ELAINE BUCHBINDER, Plaintiffs-Appellants, v. FRANCHISE TAX BOARD, STATE OF CALIFORNIA, Defendant-Appellee.	No. 00-15068 D.C. No. CV-99-20973-RMW MEMORANDUM [1] (Filed Oct 27, 2000)

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted October 16, 2000 [2]

Before: PREGERSON, KLEINFELD and GOULD, Circuit Judges.

Taxpayers Bruce and Elaine Buchbinder appeal pro se the district court's dismissal for lack of subject matter jurisdiction of their complaint challenging the

1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2 The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(end of page 1)

California Franchise Tax Board's assessment of their tax liability. We have jurisdiction pursuant to 28 U.S.C.§ 1291, and we affirm.

Because California offers a "plain, speedy and efficient remedy" in its courts for tax appeals, *see Jerron West, Inc. v. State of California State Board of Equalization*, 129 F.3d 1334, 1338-39 (9th Cir. 1998), the district court properly dismissed the Buchbinders' complaint pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The district court also properly determined that defendant state agency is not a "person" under 42 U.S.C. § 1983, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and that it is entitled to Eleventh Amendment immunity, *see Mitchell v. Franchise Tax Board (In re Mitchell)*, 209 F.3d 1111, 1115-16 (9th Cir. 2000).

AFFIRMED.

(end of page 2)

APPENDIX C -- DISTRICT COURT JUDGMENT ENTERING DISMISSAL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRUCE and ELAINE BUCHBINDER, Plaintiffs, v. CALIFORNIA FRANCHISE TAX BOARD and CALIFORNIA BOARD OF EQUALIZATION, Defendants.	NO. C-99-20973-RMW **JUDGMENT** **[Re: Docket No. 3]** (Original Filed Dec 08, 1999)

The court has issued an order dismissing plaintiff's complaint with prejudice for lack of jurisdiction.

Therefore, IT IS HEREBY ORDERED that judgment of dismissal is hereby entered and plaintiffs shall take nothing by way of their federal complaint.

DATED: 12/3/99

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

Copy of Judgment mailed on Dec 08 1999 to:

Bruce and Elaine Buchbinder
1178 Via Ferrari Drive
San Jose, CA 95122

Counsel for plaintiff

Jack Newman
Deputy Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612

Counsel for defendants

APPENDIX D -- DISTRICT COURT ORDER DISMISSING COMPLAINT AND VACATING HEARING DATE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRUCE and ELAINE BUCHBINDER, Plaintiffs, v. CALIFORNIA FRANCHISE TAX BOARD and CALIFORNIA BOARD OF EQUALIZATION, Defendants.	NO. C-99-20973-RMW ORDER DISMISSING COMPLAINT AND VACATING HEARING DATE **[Re: Docket No. 3]** (Filed Dec 07, 1999)

The motion of the California Franchise Tax Board and the California Board of Equalization to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure has been taken under submission. The court has read the moving and responding papers, and finds that defendants should prevail on their motion. The court therefore grants the motion to dismiss, and accordingly directs the Clerk to remove the motion to dismiss from the hearing calendar.

I. BACKGROUND AND ANALYSIS

Plaintiffs, who are apparently tax protestors, have filed a complaint styled as an "Appeal from the Decision of the State Board of Equalization." They seek declaratory relief from an adverse decision of the State Board of Equalization, which, for its part, appears to have been based on information collected by the federal Internal Revenue Service.

(end of page 1)

Defendants move to dismiss the claim because it is barred by operation of the Tax Injunction Act of 1937, 28 U.S.C.§ 1341. The Act deprives the court of jurisdiction over any action to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," unless the state courts do not provide "a plain, speedy and efficient remedy." Declaratory actions are clearly contained within the scope of the Tax Injunction Act. See National Private Truck Council v. Oklahoma Tax Comm'n, 115 S. Ct. 2351, 2354 (1995).

Although plaintiffs' arguments are not entirely clear, they appear to reduce to two arguments: 1) that the state government was acting as an agency of the federal government, and that it thus is not protected by the Tax Injunction Act; and 2) that their suit involves civil rights claims, and should be allowed to proceed as a Section 1983 suit.

Both claims lack merit. Plaintiffs cite no authority for the irrational proposition that cooperation by a state government with the federal government creates an agency relationship, thereby vitiating the state's sovereign immunity. In any event, plaintiffs' own papers show that the Board of Equalization did not mechanically apply findings made by the IRS; rather, the IRS findings were accorded a presumption of correctness, which plaintiffs failed to rebut. Appeal of Bruce and Elaine Buchbinder, Cal. St. Bd. of Equal., Feb. 25, 1999 (citing Appeal of Bernard J. and Elia C. Smith, Cal. St. Bd. of Equal., Jan. 9, 1979). This deference to federal findings hardly makes California tax agencies an instrumentality of the federal government.

The Section 1983 claim is also meritless. Putting aside for a moment the Tax Injunction Act problems with the complaint, the state agencies named as defendants are not "persons" acting "under color" of state law. See Will v.

Michigan Department of State Police, 491 U.S. 58 (1989).

Finally, even notwithstanding the Tax Injunction Act, plaintiff's claim appears to be barred by the Eleventh Amendment; there is no suggestion that either Congress or the State of California has waived defendants' immunity for suit.

II. ORDER

For the foregoing reasons, the court grants the motion to dismiss. Because no amount

(end of page 2)

of amendment can cure the jurisdictional defects in plaintiff's complaint, the complaint is dismissed with prejudice. The Clerk is directed to remove the previously noticed hearing on this motion from the calendar. The court will enter a judgment of dismissal this day.

DATED: 12/3/99

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

(end of page 3)

Copy of order mailed on Dec 08 1999 to:

Bruce and Elaine Buchbinder
1178 Via Ferrari Drive
San Jose, CA 95122

Counsel for plaintiff

Jack Newman
Deputy Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612

Counsel for defendants

(end of page 4)

APPENDIX E -- NOTICE OF APPEAL TO THE U.S COURT OF APPEALS FOR THE NINTH CIRCUIT

Bruce and Elaine Buchbinder, *Sui Juris*
1178 Via Ferrari Drive
San Jose, California 95122
Telephone: (408) 279-4054

In Their Own Stead -

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United States District Court,

Northern District of California

(San Jose Division)

Bruce Buchbinder; Elaine Buchbinder,	)	Docket No. C-99 20973 RMW
	)	NOTICE OF APPEAL
Plaintiff and Petitioner,	)	
vs.	)	
Franchise Tax Board, State of California,	)	
-and-	)	
Board of Equalization, State of California,	)	(Original Filed Dec 23, 1999)
Defendant and Respondent	)	

Notice is hereby given that plaintiff Bruce Buchbinder and Elaine Buchbinder hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order of the United States District Court for the Northern District of

(end of page 1)

California and the judgment rendered thereon, the decision of the U.S. District Court filed in the above-captioned proceeding on December 8, 1999.

DATED: December 23, 1999

Respectfully Submitted,

_____

Bruce Buchbinder,
Plaintiff and Petitioner

_____

Elaine Buchbinder,
Plaintiff and Petitioner

(end of page 2)